United Nations S/2008/356

Security Council

Distr.: General
3 June 2008
Original: English

## Letter dated 3 June 2008 from the Secretary-General to the President of the Security Council

I attach for your attention a letter dated 30 May 2008 from Judge Dennis Byron, President of the International Criminal Tribunal for Rwanda, including an enclosure dated 22 May 2008 from Mr. Hassan Jallow, Prosecutor of the Tribunal, regarding the matter of outstanding fugitives in both the Republic of Kenya and the Democratic Republic of the Congo (see annex).

I should be grateful if you could bring the present letter and its annex to the attention of the members of the Security Council.

(*Signed*) **Ban** Ki-moon

08-36459 (E) 090608

## Annex

### Letter dated 30 May 2008 from the President of the International Criminal Tribunal for Rwanda to the Secretary-General

I have the honour to convey the attached communication from Mr. Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda dated 22 May 2008 regarding the matter of outstanding fugitives in Kenya and the Democratic Republic of the Congo.

I should be grateful if you could bring the present letter and its annexes to the attention of the President of the Security Council.

(*Signed*) Dennis **Byron**
President

**Enclosure**

## Letter dated 22 May 2008 from the Prosecutor of the International Criminal Tribunal for Rwanda to the Secretary-General

**RE: COOPERATION OF THE REPUBLIC OF KENYA AND THE DEMOCRATIC REPUBLIC OF CONGO IN ARREST OF ICTR FUGITIVES**

As of now, there are 13 persons indicted by the ICTR for serious violations of international humanitarian law in Rwanda in 1994 who remain at large as fugitives from justice. Some of these fugitives may well be dead but several others are known to be alive and the OTP-ICTR is in possession of information about their possible whereabouts. Kenya and the DRC are countries which according to our information, continue to harbour some of these fugitives.

As the ICTR approaches the end of its mandate pursuant to Security Council Resolution 1503 (2003), it becomes all the more urgent for member states to cooperate fully in the arrest of fugitives so that those of them earmarked for trial at the ICTR can be prosecuted in time and the rest referred to competent national jurisdictions for trial.

As Your Excellency is aware, all states have a legal duty to cooperate with the ICTR. This duty arises from amongst others Article 25 of the Charter of the United Nations, Security Council Resolution 955 establishing the ICTR, and Article 28 of the Statute of the ICTR. All member states are also under a duty to comply promptly with the orders and decisions of the ICTR Trial Chambers.

From the information available to the tribunal, some high level ICTR indictees are present in Kenya and the DRC. The level of cooperation with the ICTR from these two countries, we believe, is not commensurate with their legal responsibilities. I request accordingly that, Your Excellency consider bringing this matter to the attention of the President of the Security Council with the request that the Council take appropriate action to call on the governments of Kenya and the DRC to act in a timely manner to ensure the arrest and transfer to Arusha of all such fugitives and to cooperate with the ICTR in all other respects in relation to the fugitives.

As Your Excellency is aware, the Security Council by its Resolution 1503 (2003) acting under Chapter VII of the United Nations Charter called *inter alia* on Kenya and the DRC "to intensify cooperation with and render all necessary assistance to the ICTR including ... efforts to bring Felicien Kabuga and all other such indictees to the ICTR..." (Operative paragraph 3 of U.N. Security Council Resolution 1503). This call has been reiterated by the Council in its Resolution 1534 (2004).

In the case of Kenya, the reports of the Joint Task Force (ICTR-Kenya) and other reliable independent sources have confirmed that:-

(a) Felicien Kabuga entered Kenya in 1994, was granted a residence and business permit in 1995, has been spotted there several times between 1997 and 2007 and there is no indication he has left the country;

(b) Kabuga has several business interests and property in Kenya; and

(c) Kabuga has operated a number of bank accounts in Kenya in his name and jointly with others.

The actions required of Kenya are as follows:-

(i) investigation by the Kenya Police of the presence of Kabuga in Kenya and his arrest and transfer to the ICTR or provision of credible indications of his departure from the country;

(ii) investigation of the interests of Kabuga in the businesses mentioned and his properties and upon confirmation, the taking of appropriate steps for their seizure as requested by the ICTR; and

(iii) the taking of the necessary steps to freeze the bank accounts held in Kabuga's name either singly or jointly with others.

I attach further particulars regarding the issue of Kenya's level of cooperation in the Felicien Kabuga case for Your Excellency's attention.

In the case of the DRC, the ICTR Tracking Team has located 8 of the 13 fugitives in well-defined areas in Eastern DRC. Two of these fugitives are high level indictees who have been earmarked for trial in Arusha and the rest for transfer to a competent national jurisdiction for prosecution. In October 2003, the ICTR served the DRC with the arrest warrants and indictments in respect of these fugitives.

Whilst there may be challenges of effective access to some of the areas within the DRC where some of the fugitives are located, it is possible for the challenges to be overcome in my view, if the DRC were to collaborate closely with the ICTR, MONUC and other parties.

I was able to undertake one mission to Kinshasa in 2005 when following consultations, I was assured of full cooperation by the government in the arrest of these fugitives. Since then, the Tracking Team of the ICTR has received little assistance from the

DRC authorities who have also largely failed to respond to requests for ICTR-DRC meetings to address the matter.

Our efforts to reach DRC authorities directly and through third parties have, until this week, been unsuccessful. A response to my most recent request to the DRC dated 28th April 2008 conveyed through MONUC requesting a tripartite ICTR-MONUC-DRC meeting to work out modalities for the arrest and transfer of the fugitives was only received this morning.

Although the response indicates the willingness of the DRC to meet as requested, it is necessary for the Security Council to remind the DRC of its obligation to cooperate and to require it to accede to the ICTR requests for establishing a mechanism for such cooperation.

Please accept Your Excellency my compliments and assurances of my highest consideration.

Sincerely,

Hassan B. Jallow
Chief Prosecutor, ICTR
Under Secretary-General, United Nations

## Attachment

1. KENYA – FELICIEN KABUGA is considered by the ICTR as its highest level fugitive and has been earmarked for trial at the ICTR. His indictment for genocide and crimes against humanity was presented by the Prosecutor to and confirmed by a trial chamber of the ICTR in October 1997. The charges against Kabuga essentially revolve around his material support to the RTLM hate radio, of which he was a shareholder, and of the MRND interahamwe militia, both of which were powerful instruments of the genocide. On the 26th of November 1997, a judge of the ICTR issued a Warrant of Arrest and Order for Surrender in relation to Kabuga with the further order that the decision and warrant of arrest be served on the authorities in Kenya. Indeed, as long ago as that time, Kabuga's presence in and association with Kenya had been confirmed.

2. It was however only in 2007, following a number of missions undertaken personally by the ICTR Prosecutor for consultations with the government in Nairobi that Kenya agreed to the creation of a joint ICTR-Kenya Task Force comprising Kenyan officials and ICTR investigators to investigate Kabuga's presence and activities in Kenya. That Task Force has now presented two reports to both parties.

3. The reports of the Task Force and other independent and reliable sources have established the following:

   (i) Kabuga entered Kenya on 3rd September 1994 and was granted a visitors visa. In March 1995, he was issued with a two year residence and business visa. The business visa was issued on the grounds that he was the Director of Establissements Kabuga Felicien and the owner of Dunezy Freighters Ltd (both registered in Kenya) and upon a further investment by way of additional fixed deposit of 10 million Kenya shillings with the Commercial Bank of Africa Ltd;

   (ii) In early 1997 when Kabuga applied for a renewal of his residence and business permit, a senior Kenya Immigration Officer noted in writing that Kabuga was suspected to be involved in the genocide through his relationship with the RTLM, etc.;

   (iii) On 14th May 1997, Kabuga was arrested by the Kenya Police and detained at the Kilimani Police Station in Nairobi on the orders of the Principal Immigration Officer. His residence permit was cancelled on 20th May and he was scheduled to be deported;

   (iv) Kabuga was however released on the same day 20th of May and merely ordered to leave Kenya;

   (v) On 3rd June 1997, however, the Director, Liaison Department in the Office of the President of Kenya wrote to the Principal Immigration Officer to stand over the deportation of Kabuga until further discussions were held. There is no evidence of any such further discussions or that Kabuga was eventually deported;

(vi) In July 1997, the ICTR together with the Kenya Police mounted Operation NAKI East Africa for the arrest of 10 suspects including Kabuga under Rule 40bis of the ICTR Rules of Procedure and Evidence since no indictments had as yet been issued against any of them. All the suspects were arrested in Nairobi save Kabuga who fled from his residence at the Jemina Court apartments in Kilimani area of Nairobi just before the joint ICTR-Kenya Police team arrived on the scene;

(vii) In January 2003, an informant for the ICTR who had information on Kabuga was found murdered the day before he was due to meet with Kabuga in Nairobi. His death has always been suspected to be connected with the efforts to arrest Kabuga. But the death of the informant has not to our knowledge been investigated by the Kenya Police;

(viii) Between 1997 and 2007 there have been several reported sightings of Kabuga on different occasions and different parts of the country. Some of the reports are considered credible. He has been seen in the company of ordinary citizens and former government officials as well as visiting doctors, estate agents, etc. These reports have been brought to the attention of the Kenya Police by the Tracking Team of the ICTR;

(ix) In May 2005, the presence of Felicien Kabuga under heavy private security was confirmed at a villa in Athi River near Nairobi. An attempt to arrest him was thwarted as he and his escorts hurriedly left before ICTR investigators and Kenya Police arrived at the premises.

(x) There is no evidence that Kabuga has at any time been deported from or left Kenya.

4. Despite all this strong evidence of the probability of Kabuga's presence in Kenya, its Police have not in any serious and sustained manner investigated his presence with a view to conclusively eliminating it or ensuring his arrest and transfer to the ICTR. It has always been emphasized by the ICTR to the Kenya authorities that it is their responsibility to carry out these investigations within their territory and take appropriate action.

5. The reports of the Joint Task Force and credible independent sources have established that Kabuga has several business interests in Kenya. He is reported to have interests in the following, either directly in his own name or in the names of family members, friends and other business partners:-

(i) Property known as "Spanish Villa" which Kabuga purchased in Nairobi on 13th November 1995 at Kenya Shillings 6 million. It was not until May 2008 that the Kenya government proceeded to the High Court in Nairobi, following the request of the ICTR Prosecutor and obtained an order 'freezing' the property. Similar action needs to be taken in respect of other business or property interests;

(ii) Establishments Kabuga Felicien

(iii) Dumezy Freighters

(iv) Zadock United Company Ltd

(v) Nshikaben Agencies Ltd

(vi) Zadock Transporters

(vii) Ndimo Enterprises

(viii) Wida Agencies

(ix) In-Store Promotion

All these businesses are registered in Kenya.

6. With the exception of action taken lately on the 'Spanish Villa" property, no serious investigation has been carried out by the Kenya Police to confirm or rebut reports of Kabuga's interests in these businesses and to take action for their freezing, despite the requests of the ICTR Prosecutor. Where the Joint Task Force has sought to further investigate some of these matters it has not had the full cooperation of certain offices and individuals.

7. The reports of the Joint Task Force have also established that Kabuga has operated the following bank accounts in Kenya:-

(i) Commercial Bank of Africa – account numbers 102760018 and 102760028. As a matter of fact, it turned out that on 24th August 2006 whilst the Prosecutor was on a much publicized mission to Kenya to consult on the Kabuga file, the bank wrote to Kabuga at a post box address in Nairobi inviting him and his co-account holder to call at the bank and close the accounts as the bank no longer wished to continue doing business with him!

(ii) An account with Barclays Bank of Kenya Ltd; and

(iii) An account at the Family Finance Ltd

All the banks have refused to cooperate with the Task Force. So far, no action has been taken by the Kenya authorities to compel such cooperation and to seek judicial orders freezing the accounts.

8. The actions required of Kenya are as follows:-

(i) investigation by the Kenya Police of the presence of Kabuga in Kenya and his arrest and transfer to the ICTR or provision of credible indications of his departure from the country;

(ii) investigation of the interests of Kabuga in the businesses mentioned and his properties and upon confirmation, the taking of appropriate steps for their seizure as requested by the ICTR; and

(iii) the taking of the necessary steps to freeze the bank accounts held in Kabuga's name either singly or jointly with others.